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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. ____

ALMEDA MALL, INC., NORTHWEST MALL, INC.,
AND WESTWOOD MALL, INC.,

Petitioners,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners Almeda Mall, Inc., Northwest Mall, Inc., and Westwood Mall, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 11, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 615 F.2d 343 and appears in the Appendix at page 1a. The opinion of the District Court for the Southern District of Texas was not reported but also appears in the Appendix at page 24a.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 11, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether Section 2 of the Sherman Antitrust Act as interpreted in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973) prohibits the only electric utility in a major metropolitan area from refusing to sell electricity to certain regional shopping malls because those malls plan to resell the electricity through their own distribution systems to mall tenants, where such refusal would (a) require the malls and the mall tenants to pay more for electricity than they would pay with the mall's own system of distribution, (b) result in installation of a less reliable distribution system, (c) prevent installation of energy conservation systems not available through individual metering, and (d) lessen competition for tenants between malls.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15:

Section 2

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding Fifty Thousand Dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.[1]

[1] Section Two was amended effective December 21, 1974 (after filing of these suits) to increase the criminal penalties.

Section 15

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damage by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Introduction

In the course of developing their shopping centers, Petitioners sought to purchase electricity from Houston Lighting & Power Company ("HL&P" or "Respondent"), in order to resell or redistribute that electricity to their respective tenants through the centers' own redistribution systems. HL&P, which controls 99% of the generation, transmission and distribution of electricity in all relevant geographic markets, consistently refused to sell electricity to Petitioners because of Petitioners' plans to resell. HL&P's conceded purpose was to level out competition among shopping malls in the Houston area and to eliminate the benefit which petitioners would be affording to their tenants by using electricity as a competitive device. Petitioners were forced by such refusals to bring these consolidated actions, which were tried before a jury in the district court. HL&P persuaded the district court to direct a verdict and withdraw the case from the jury, and the Fifth Circuit affirmed.

Facts Relating to Petitioners and Their Operations.

Almeda Mall, Inc., Northwest Mall, Inc. and Westwood Mall, Inc. ("Petitioners" or "the Malls") have developed, own and operate regional shopping centers known by those

same names in the City of Houston, Texas (T. 28, 35-36, 114).[2] Almeda Mall and Northwest Mall are twin shopping centers owned by Subsidiaries of The Rouse Company of Columbia, Maryland[3] (T. 28, 304-05). Westwood Mall was, at the time of this litigation, a subsidiary of Monumental Properties, Inc., a Maryland corporation located in Baltimore, Maryland (T. 106).

Including Petitioners' malls, there were twelve such regional malls in the Houston metropolitan area. A regional mall or regional shopping center can be described as a large enclosed assemblage of stores consisting of two or more department stores and 75 or more smaller stores occupying an integrated structure containing in excess of 150,000 square feet of floor space. It is promoted as a unit and draws customers from a distance of approximately 30 minutes drive (T. 30, 47-48, 90, 264-65). The twelve malls in the Houston metropolitan area circumscribe Houston to the north, west and south, generally on or near the interstate beltway which surrounds the city (PX 17-18; T. 130). These malls compete vigorously with each other both for tenants to locate in the mall and for consumers who have the choice to go to any of several malls (T. 265-77).

The quality of the tenants and the mix of retail uses are vital to the overall success of the regional shopping center. In competing for tenants, the shopping center developer puts together a package of services to entice the merchant to lease space in the mall, including an attractive store front located on an enclosed common area, security, lighting for the mall, heating and air conditioning,

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[2] The trial transcript will be referred to by the abbreviation T. Plaintiffs' exhibits will be PX and defendant's exhibits DX.

[3] After the commencement of this litigation, The Rouse Company sold one-half of its interest in these two malls to Corporate Property Investors, a New York Company. Subsidiaries of The Rouse Company continue to operate and maintain the malls (T. 29).

advertising and general promotion, maintenance and certain improvements to the tenant's space (T. 31-33, 111-113).

As part of the package of services offered to tenants, Petitioners wanted and intended to include electric service (T. 93, 328). The charges for electricity would be included in the rent on a per square foot basis or would be separately stated as a flat rate (T. 85). The standard form lease which each Petitioner used authorized Petitioners to provide the electricity. Petitioners warrant to the tenants that the cost of the electricity for their respective stores will be no greater than if HL&P provided it (T. 85, 146-47). However, because of savings in electrical costs for the common areas of the centers and for heating and air conditioning the entire center, which costs are paid by the tenants as part of their rent, the total electrical costs paid by the tenants would have been less than if the tenants purchased electricity directly from HL&P (T. 54, 99).

Redistribution or resale of electricity is done by The Rouse Company and Monumental Properties, Inc. at other of their regional shopping centers in Texas and elsewhere. In at least 16 other shopping centers the Rouse Company operates, it redistributes electricity to its tenants. Two of these centers are in Texas (T. 52-53). Monumental Properties redistributes electricity to tenants in four other malls, two of them also in Texas (T. 107, 141).

The Mall Systems Are Superior to HL&P's Systems.

Under the systems proposed by Petitioners and presently in use at other Rouse and Monumental Properties malls, each mall would purchase power from HL&P through no more than four meters, at HL&P's large general service (LGS) rate, a rate applicable to large users of electricity.

The mall would, in turn provide all common area and individual tenant electric needs through a distribution system which, although initially more costly to the malls, would be both more reliable and more efficient than the existing HL&P distribution systems; and result in substantial savings to the mall and the mall's tenants (T. 116, 212, 1293-4).

Contrary to the characterization of the court of appeals, these benefits are not merely speculative, since Petitioners' expert, Mr. Schwartz, has designed and installed similar systems for Petitioners' principals in other shopping center developments where redistribution of electricity was permitted (T. 1217).

HL&P's direct service does not provide these benefits. The system designed by Mr. Schwartz would have been offered to Petitioners' tenants at a total economic cost less than that being charged by HL&P with its direct service.

Peak load monitoring devices could also be utilized if Petitioners redistributed electricity. Such devices monitor peak load demand and reduce such demand, thereby reducing the overall electrical charges for all occupants of the mall. For instance, when the demand is especially great, the system would *ad seriatim* shut down tenants' air conditioners for one or two minutes at a time to lower demand without a noticeable loss in service (T. 122-23, 139-40).

Although the shopping center developer would have to design and install its own distribution system at substantial capital expense, Petitioners showed that they would still realize savings for the tenants and a profit for themselves (T. 54, 95-99, 121-22, 1186-1236). Petitioners would achieve these results through technical innovation

as described above and by capturing part, but not all, of the savings from the rate differentials. The uncaptured portion would pass to the tenants in lower common area and heating, ventilating and air conditioning charges (T. 54, 99).

HL&P Unreasonably Refused to Permit Resale by Petitioners

The only reason that the malls never installed the system described above is that HL&P flatly refused to sell them electricity for resale. Petitioners made their initial requests to purchase electricity from HL&P for redistribution in the malls before the malls commenced construction (T. 158-59, 225-27) and subsequently renewed such requests. HL&P persistently refused them permission to redistribute electricity, requiring that Petitioners construct and wire the malls to allow HL&P to deal directly with each tenant rather than letting Petitioners redistribute electricity to their tenants (T. 159, T. 435-6; PX. 19).

While the HL&P rate schedules prohibit the resale of electricity, the record if replete with examples of HL&P approved resale of electricity by many types of building owners. A great many office buildings, both in the old downtown area and elsewhere, are allowed to resell electricity to retail tenants and virtually all buildings resell electricity to office tenants (T. 1073-93, 1088-99, 1132-34).

Several large complexes with many tenants comparable to Petitioners' tenants also received special exceptions to HL&P's rates when HL&P felt it was in HL&P's own best economic interest (T. 1094; PX 140B, PX 140K, PX 161C). Finally, apartment developers in Houston all have the right to resell electricity (T. 870-71).

Contrary to HL&P's position on why resale should be prohibited, the numerous exceptions to the rule have apparently *not* caused HL&P financial hardship.

Harassment of Westwood Mall During Construction

The abuse of HL&P's monopoly power over the distribution of electricity is further evidenced by an incident in which HL&P temporarily refused electricity to Westwood Mall during construction. Notwithstanding HL&P's practice of furnishing temporary power for testing electrical systems during construction, HL&P refused to provide such service because of the instant litigation against HL&P. (T. 543-44). Such refusal was authorized by a Vice President of HL&P (T. 651-62, 670, 672, 674).

HL&P's Rationale

HL&P's refusal to deal and harassment during construction were clearly motivated by its desire to extend its retail distribution monopoly into the new centers and to eliminate the sale of electricity as a competitive factor in the development of shopping centers. No less than three HL&P officers testified that the resale prohibitions were for the purpose of "evening out" the cost of electricity and eliminating it as a competitive factor. The officers were concerned lest electricity become a "competitive factor" (T. 870-871, 1157-58, 1124-25). In short, the restrictions were intended to insulate prices of electricity from competitive pressures.

Summary

The facts developed during the course of the trial demonstrated that redistribution of electricity by petitioners would:

(a) benefit the tenants by reducing their electricity costs;

(b) provide for an electrical distribution system with a higher degree of reliability than that provided by HL&P;

(c) provide for energy conservation systems not available through individual metering; and

(d) improve the competitive posture of the petitioners in attracting tenants to their malls.

Proceedings Below

Petitioners brought suit against HL&P in the United States District Court for the Southern District of Texas in actions filed in November and December of 1973. Those actions alleged violations of the federal antitrust laws and a Texas antidiscrimination law. Jurisdiction was based on 15 U.S.C. § 15 and principles of pendent jurisdiction.

The cases were consolidated for trial and tried before a jury over a two week period of time. At the close of the evidence the district judge granted HL&P's motion for a directed verdict, denied Petitioner's motion for a directed verdict and took the case from the jury. The basis for the court's ruling is contained in the unpublished bench ruling which is reproduced in the Appendix at page 24a. Judgment was entered for HL&P on February 20, 1978.

The case was timely appealed to the United States Court of Appeals for the Fifth Circuit on March 13, 1978. The court of appeals affirmed the district court in a decision rendered on April 11, 1980 (the same day judgment was entered). This petition was filed within ninety days of that decision and entry of judgment.

REASONS FOR GRANTING THE WRIT

Petitioners have contended throughout this litigation that the instant case is controlled by the Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), wherein the Court held that a major electric utility

could be required to sell electricity at bulk rates for redistribution by municipalities. The lower courts steadfastly refused to apply *Otter Tail* to the instant case, notwithstanding the obvious similarities in the facts. The manner in which that case was distinguished and the lower courts' imposition of additional requirements of proof in monopolization cases lead Petitioners to the inescapable conclusion that *Otter Tail* has been substantially limited in the Fifth Circuit. This result is against the tide of the Court's recent decisions which have increasingly applied the antitrust laws to regulated monopolies. The ultimate effect of the lower court's decision is to entrench vertically integrated monopolists by precluding competition by persons competing on only one functional level.

I.

THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH THE COURT'S DECISION IN *OTTER TAIL*.

A.

This Case is Factually Indistinguishable From Otter Tail

The instant case and *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), are factually indistinguishable. In both cases regulated electric utilities with monopolies in generation and/or transmission refused to sell power to entities which wished to resell that electricity to persons who were potential retail customers of the monopoly. In neither case did the new entities seek to compete in every facet of the monopolist's business, nor did they give ultimate consumers an individual choice of from whom to purchase. In both cases the monopolists exacerbated their refusals to deal by harassing the new entities after they had challenged the monopolists' refusals to deal.

Notwithstanding the obvious factual equivalence, the court of appeals tried to avoid *Otter Tail* by distinguishing

it on its facts. A close reading of the two cases, however, establishes that the factual distinctions made by the court of appeals are not supportable. The principal distinction relied upon by the court of appeals is that the malls in the instant case would never compete with HL&P whereas municipalities in *Otter Tail* would compete with Otter Tail Power Company. Appendix at 16a. This distinction is flatly belied by the Court's opinion in *Otter Tail*. At 410 U.S. 369, Justice Douglas explicitly stated:

> "Each town in Otter Tail's service area generally can accommodate only one distribution system, making each town a natural monopoly market for the distribution and sale of electric power at retail. The aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail. That competition is generally for the right to serve the entire retail market within the composite limits of a town and that competition is generally between Otter Tail and a prospective or existing municipal system." (footnotes omitted).

The competition in *Otter Tail* was, therefore, precisely like the competition here. The competition was between the utility and a prospective supplier for a delineated retail market, serving that market only. In this respect, the Malls are perfectly analagous to the municipalities which sought to redistribute power generated by Otter Tail Power Company.

Secondly, the court of appeals apparently felt it significant that HL&P was the only company in the Houston area which *generated* electricity for resale, thereby making it somehow less culpable for HL&P to refuse to sell to the Malls. The court of appeals noted that in *Otter Tail* the utility had aggravated its refusals to sell by also refusing to "wheel" power from other producers. Appendix at 16a. Where, as in the instant case, there is no other producer to "wheel" power from, the wheeling question does not arise.

This is not a basis for distinguishing *Otter Tail*, however, since the Court treated Otter Tail's refusal to wheel in the same fashion as Otter Tail's refusal to sell. The clear implication of the court of appeals' decision is that a utility with both transmission and generation monopolies may legally refuse to deal with potential competitors where a utility with only transmission monopolies could not, a proposition clearly contrary to established principles of antitrust law. The Court in *Otter Tail* explicitly recognized that Otter Tail Power Company alone had the transmission lines necessary to supply the municipalities. 410 U.S. at 370. Thus, "bottlenecks" exist in both cases; in *Otter Tail* it was, for wheeling purposes, a transmission bottleneck, while in this case they were transmission and generation bottlenecks.

The third distinction that the court of appeals makes is that *Otter Tail* deals with sales of power at wholesale, whereas the instant case deals with sales of power at retail. Appendix at 17a. It is not clear from the court of appeals' decision why that distinction is important since both monopolists refused to sell power because of the purchasers' plans to resell the power at retail. In both cases the rate at which the purchasers sought to purchase electricity from the utility was lower than the utility's rate for the ultimate consumer. Whether that rate is called a "wholesale rate" or a "large general service rate" is irrelevant. The refusals to sell were both directed at monopolization of *retail distribution* of electric power and it was monopolization of this market which concerned the Malls and the Court in *Otter Tail*. The Court said at 410 U.S. 368:

> . . . [T]he District Court found that Otter Tail had attempted to monopolize the *retail distribution* of electric power in its service area in violation of Section 2 of the Sherman Act. 15 U.S.C. Section 2. The District Court found that Otter Tail had attempted to prevent communities in which its *retail distri-*

> *bution* franchise had expired from replacing it with a municipal distribution system. The principal means employed were (1) refusals to sell power at wholesale to proposed municipal systems in the communities where it had been *retailing* power . . . ." (emphasis added).

Thus, in both cases the utility was attempting to maintain and extend its *retail* monopoly.

The final distinction that the court of appeals attempts to draw is that the Malls do not wish to generate their own electricity, impliedly unlike the situation which existed in *Otter Tail*. Appendix at 17a. Again, the distinction fails because the court of appeals simply misunderstood the underlying facts in *Otter Tail*. The district court in *Otter Tail* found in *United States v. Otter Tail Power Company*, 331 F. Supp. 54, 60 (D. Minn. 1971), aff'd. 410 U.S. 366 (1973), that the towns of Elbow Lake and Hankinson each desired to purchase *all of their needs* from Otter Tail, or as a secondary alternative, from a more distant source such as the Bureau of Reclamation. It was only when it was denied power by Otter Tail that Elbow Lake acquired its own generating plant. 410 U.S. at 371; 331 F. Supp. at 60. Hankinson considered building transmission lines thirty-nine miles to an alternative source and did not attempt to create its own generating capacity. 331 F. Supp. at 60-61. Hankinson subsequently capitulated and renewed Otter Tail's franchise. 410 U.S. at 372.

In sum, the distinctions drawn by the lower courts between this case and *Otter Tail* are illusory. For purposes of applying Section 2 of the Sherman Act, the cases are identical.

B.

The Principles of Otter Tail *Should be Rigorously Applied Rather Than Limited*

One need dig no deeper than the footnotes in the Fifth Circuit Court of Appeals' decision in this case in order to ascertain why it distinguished *Otter Tail* in the manner it did. At base, the Fifth Circuit position is that *Otter Tail* was incorrectly decided. In footnotes 17, 20 and 21 of its opinion the Court of Appeals cites at great length the article published by Messrs. Watson and Brunner, "*Monopolization by Regulated 'Monopolies': The Search for Substantive Standards,* 22 Antitrust Bull. 559 (1977), for the proposition that *Otter Tail* has been severely criticized. The court's defense of HL&P would have been equally applicable to Otter Tail. It is difficult to determine under the holding and rationale of the lower court decision how *Otter Tail* could retain any validity in the Fifth Circuit today.

Otter Tail established important principles which deserve continuing application. The most important among these is that a "natural" monopolist may not hide behind the fact of government regulation in an effort to expand its monopoly power, and specifically, may not unjustifiably refuse to allow smaller firms to interconnect and thereby compete with it in certain segments of the monopolist's business.

Section 2 of the Sherman Act was enacted because of the prevailing belief that monopolists tended to become resistant to innovation and allowed their prices to rise, both in contravention of the public interest. As Judge Learned Hand said in *United States v. Aluminum Company of America,* 148 F.2d 416, 427 (2d Cir. 1945):

> ". . . for it is no excuse for "monopolizing" a market that the monopoly has not been used to extract from the consumer more than a "fair" profit. The Act has

> wide purposes. Indeed, even though we disregarded all but economic considerations, it would by no means follow that such concentration of producing power is to be desired, when it has not been used extortionately. Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. . . ."

Since few companies have the ability to compete with giant utilities such as HL&P in every phase of their operations, meaningful competition must perforce exist in certain specialized aspects of those businesses. In *Gainesville Utilities v. Florida Power Corp.*, 402 U.S. 515, 517-520 (1971) and in *Otter Tail,* 410 U.S. 368 at 378, the Court recognized that a small utility could not economically justify building all of the generating capacity that it would need at every moment during that utility's operation. For that reason, the Court held that power companies could be compelled to sell power to other power companies. Similarly, in *United States v. Terminal Railroad Association,* 224 U.S. 383 (1912), the Court required a consortium of railroads to allow other railroads to use a bridge that was the only point at which they could cross the Mississippi River. The reasoning of these and other cases such as *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), is that a monopolist with a natural monopoly in one area is not entitled to use that natural monopoly to achieve monopoly power in other areas. See, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *United States v. Griffith,* 334 U.S. 100 (1948).

Petitioners presented evidence below to show that their proposed system would have benefited all concerned parties except HL&P. It is undoubtedly true that some redistribution systems will, unlike Petitioners' system, be

inferior to the system that HL&P would have installed. Nevertheless, the fact of diversity is itself a benefit to be obtained from allowing the developer the choice of redistribution systems.

Refusals to deal by HL&P and other utilities harm competition on several levels. The primary level is between the utility and the Petitioners. The secondary level is between Petitioners and other lessors of retail space. Since utility provisions are a factor in locational decisions, superiority in that area may enhance one mall's competitive position, ultimately creating increased choice for prospective retail tenants.

Finally, as implied above, the refusal to resell reduces incentives for technological innovation and threatens reduction of competition among suppliers of redistribution system designs and components. HL&P and other similarly situated regulated utilities presently have no incentive to innovate in the redistribution field. Their rates of return are essentially guaranteed by the regulating body. It is only when persons like Petitioners have the freedom to do the redistribution function themselves that HL&P has any compelling reason to reexamine its own methods of distributing electricity.

The Court's post-*Otter Tail* decisions in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), recognize the value of subjecting regulated utilities to scrutiny under the antitrust laws. Those cases recognize that regulators may well have concerns other than fostering competition.

The departure of the court of appeals from both *Otter Tail* and the trend of these cases is destructive of competition and of the underlying purposes of Section Two of the Sherman Act. At a time when technologically

innovative firms are challenging entrenched monopolists in the utility, communication and transportation industries, it is critical that the court of appeals decision be reversed so that monopolists do not indiscriminately refuse to deal with competitors.

II.

THE COURT OF APPEALS HAS MISREAD *BRUNSWICK* TO ADD ADDITIONAL REQUIREMENTS TO THE *GRINNELL* ELEMENTS OF MONOPOLIZATION.

The court of appeals has misapplied this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), a relatively non-controversial decision. *See, Lee-Moore Oil Company v. Union Oil Company*, 599 F.2d 1299, 1303 (4th Cir. 1979). That decision has recently been extended by some of the lower federal courts, most notably the Fifth Circuit. The time obviously has come for this Court to call a halt to this perversion of the Court's opinion in *Brunswick*. The basis of the plaintiffs' claims in that case was that they would have made higher profits if Brunswick had allowed plaintiffs' failing competitors simply to close their doors rather than to rescue them from insolvency. Thus, the plaintiffs in that case were complaining that Brunswick's activities were procompetitive as opposed to being anticompetitive. As the court stated at 429 U.S., at 488:

> But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition, not competitors." *Brown Shoe Company v. United States*, 370 U.S., at 320.

It is important to recognize that *Brunswick* was a merger case decided under Section 7 of the Clayton Act, 15 U.S.C. § 22. The Court's decision in *Brunswick* recognizes simply that not all effects of mergers are anticompetitive, and that some mergers, particularly where one of the companies is failing, may even be procompetitive within a particular market. In contrast, monopolization is by definition never procompetitive. This fact was conclusively presumed by Congress when it passed Section 2 of the Sherman Act. See, *United States v. Aluminum Company of America,* 148 F.2d 416, 427 (1945). As such, it is redundant to impose a requirement of "antitrust injury" in a Section 2 monopolization case. The Court implicitly recognized this fact when it imposed only two requirements for proof of monopolization in *United States v. Grinnell Corp.,* 384 U.S. 563 (1961). In that case the Court stated that the two elements of illegal monopolization are:

> (1) the possession of monopoly power in the relevant market or submarket and (2) the willful acquisition or maintenance of that power with intent to monopolize, which intent need not be evidenced by predatory practices but which is not to be gathered merely from growth or development as a consequence of a superior product, business acumen or historic accident."

384 U.S. 563, 570-71. Thus, the Fifth Circuit's decision in the instant case effectively imposes an additional proof requirement beyond that imposed by the Court in previous monopolization cases.

It should be noted that the Fifth Circuit is not alone among the Circuits in its application of *Brunswick,* to non-merger cases. *See, e.g., California Computer Products, Inc. v. I.B.M.*, 613 F.2d 727, 732 (9th Cir. 1979); *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979), cert. denied ____ U.S. ____, 62 L. Ed. 2d 783 (1980); *Kapp v. National Football League,* 586 F.2d 644 (9th Cir. 1979). *But see, Lee-Moore Oil Company v. Union Oil*

Company, supra. The Fifth Circuit alone, however, has gone to the lengths of making proof of antitrust injury an affirmative element of a monopolization case.

Even if *Brunswick's* antitrust injury requirement should be extended to Section 2 monopolization cases, there were ample grounds for the jury in the instant case to have found that there would be such injury. The holdings of both lower courts to the contrary were based on their findings, in contravention of *Otter Tail*, that there was no competition in the instant case. To the extent that competition existed in *Otter Tail*, it certainly existed in the instant case.

As stated in the preceding section, there was competition on several levels which was harmed by HL&P's refusal to deal. The most important competition is inherent in the Malls' choice between distributing electricity themselves to their tenants or having that service performed by the utility. The very existence of that choice provides incentive for the utility to provide redistribution services more efficiently and more cheaply. Thus, the ultimate goals of the antitrust laws would have been served.

The lower courts found an absence of competition because the ultimate effect of the Malls' proposal would be to "substitute" the mall for the electric utility in the redistribution process. Appendix at 17a. This is a meaningless distinction, however, since every purchasing decision substitutes one supplier for another.

In sum, the court of appeals erred both by extending *Brunswick* to unjustifiable lengths and by failing to interpret the holding of that case to be consistent with the holding in *Otter Tail.*

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

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July, 1980

APPENDIX

In The United States Court of Appeals
For The Fifth Circuit

April 11, 1980.

No. 78-1586.

Alameda Mall Inc. and Northwest Mall, Inc., Plaintiffs-Appellants, Cross-Appellees,

v.

Houston Lighting & Power Co., Defendant-Appellee, Cross-Appellant.

Westwood Mall, Inc., a Maryland Corporation, Plaintiff-Appellant, Cross-Appellee,

v.

Houston Lighting & Power Co., a Texas Corporation, Defendant-Appellee.

* * * * * *

Appeals from the United States District Court for the Southern District of Texas.

Before COLEMAN, Chief Judge, REAVLEY and ANDERSON, Circuit Judges.

COLEMAN, Chief Judge.

In this antitrust action the plaintiff Malls charge that Power Company refusal to sell them electricity through a single meter for individual resale to their business tenants is a violation of the federal antitrust laws and is discriminatory under Texas state law.

The lengthy record presents novel issues. The Malls do not generate or transmit or distribute electric power generally, and they have no intention of doing so. They simply wish to have the Power Company deliver electric power to them at a single meter, after which they would sell it to their respective tenants at the same retail rates now charged by the Utility.

The District Court granted a directed verdict in favor of the Power Company on all issues. We affirm.

I.

The plaintiff-appellants are developers and owners of three regional shopping malls, Almeda Mall, Inc., Northwest Mall, Inc., and Westwood Mall, Inc., in Houston, Texas. The defendant-appellee, Houston Lighting & Power Company (HL & P), is a privately owned electric utility company, operating under a non-exclusive franchise granted by the City of Houston.

The Regulatory Framework

HL & P operates under a nonexclusive franchise granted initially by the City of Houston late in the nineteenth century and last renewed in 1957. The franchise is nonexclusive because Texas does not authorize a utility to have any type of exclusive monopoly.[1] The City of Houston is empowered to franchise additional electric utilities at any time. The HL & P franchise stipulates that under certain circumstances the City may purchase HL & P's facilities and operate the utility. Despite these options, HL & P is the only franchised electric utility in the City of

[1] Tex. Const. art. I, § 26; Tex. Rev. Civ. Stat. Ann. art. 7428a. *See Lea County Electric Cooperative, Inc. v. City of Plains*, 373 S.W.2d 90 (Tex. Civ. App. 1963).

Houston and the surrounding area. Consequently, HL & P is presently a natural monopoly for the distribution of electric power.

When this suit was filed, Texas had no regulatory commission to oversee public utility activity. Texas relied on local municipalities to regulate utilities as allowed under state law.[2] In 1975, Texas enacted a Public Utility Regulatory Act (PURA) and created a statewide Public Utilities Commission. Under PURA, however, municipalities retained their regulatory power under the same standards and rules applicable to the new commission.[3]

Within this framework, state law and the nonexclusive franchise give the City of Houston the power to regulate practically all operations of HL & P regarding rates, operating procedures, and services to customers. The fact that the City can and does regulate HL & P actively is strongly supported by the record.[4]

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[2] Control of utilities by municipalities was provided by Tex. Rev. Civ. Stat. Ann. art. 1119, which was repealed in 1975 with the passage of the Public Utility Regulatory Act (PURA), and by Tex. Rev. Civ. Stat. Ann. art. 1175(12) which provides in part that municipalities can

> . . . determine, fix and regulate the charges, fares or rates of any person, firm or corporation enjoying or that may enjoy the franchise or exercising any other public privilege in said city and to prescribe the kind of service to be furnished by such person, firm or corporation, and the manner in which it shall be rendered, and from time to time alter or change such rules, regulations and compensation. . . .

[3] PURA, Tex. Rev. Civ. Stat. Ann. art. 1446c, Section 17(a) provides

> Sec. 17. (a) Subject to the limitations imposed in this Act, and for the purpose of regulating rates and services so that such rates may be fair, just, and reasonable, and the services adequate and efficient, the governing body of each municipality shall have exclusive original jurisdiction over all electric, water, and sewer utility rates, operations, and services provided by an electric, water, and sewer utility within its city or town limits.

[4] The record clearly indicates that HL & P is continuously regulated by the City. In 1959, the City prohibited HL & P from

Rate Structure

HL & P operates with 23 rate schedules, distinguished by the *type* and *quantity* of electric service rendered. Four of the schedules have been formally adopted by the City of Houston by rate ordinances, including (1) RS-1, residential service; (2) MGS-1, miscellaneous general service for loads not in excess of 50 kilovolt amperes; (3) H-7, small direct current usage for motors and other electrical equipment with a connected load of less than 100 horsepower; and (4) MSL, municipal street lighting. The remaining 19 schedules are not formalized by City ordinance but are submitted to the City as tariffs, automatically taking effect within a prescribed period of time. These rates are, however, at all times subject to the control and regulations of the City and can, in fact, be adopted by City ordinance.

The rate schedules applicable in this case are HL & P's general service rates: (1) MGS, for a demand up to 50 kilovolt amperes (the same as MGS-1 adopted by ordinance for city classification purposes); MGS-1L, for a demand above 50 kilovolt amperes; and LGS, for a demand about 700 kilovolt amperes with certain usage. These scheduled rates vary according to the level of demand and use. Because of the volume of electricity consumed, the LGS rate costs less than the MGS or MGS-1L rates.

Resale Practices

For many years, it has been HL & P's policy, and practice, not to allow the resale of electricity. All rate schedules used by HL & P, whether effected by ordinance or not, specifically state that resale is prohibited. Under the MGS City ordinance, however, a special contract may

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using residential demand meters. In 1960, HL & P applied for a rate increase which resulted in hearings lasting over a year and ended with the City Council fixing the rate of return on all classes of service. In 1966, the Public Service Department recommended to the City that HL & P earnings were too high and HL & P was required to lower all of its rates. In 1970, following application and investigation, new rates were enacted and approved by the City for HL & P earnings.

be allowed permitting resale of power along with other commonly prohibited services.[5]

Trial testimony revealed several reasons for restricting resale of electricity by HL & P. One is that direct service by the utility to the customer eliminates intrusion by an unregulated middleman and prevents possible conflicts over duties to maintain and repair the electrical system.[6]

[5] The MGS ordinance reads in part:

> (2) This schedule shall not be available for loads in excess of 50 kva, temporary, breakdown, stand-by, supplementary or resale service, except upon special contract.

HL & P defines the "special contract" exception as follows:

> The "special contract" exception has been interpreted, with the concurrence of the Public Service Department of the City, to be limited to those situations where it is not feasible for the Company to furnish service direct to the users of such service.

[6] On direct examination, Mr. Tom Tyson, Public Service Director, testified as follows about the provisions in rate schedules against resale:

> Q. From the standpoint of regulating the company, is that provision of some importance, or not?
> A. Of great importance.
> Q. And could you describe for us what the significance or what the importance of that provision is?
> A. It's in the public interest that the utilities serve the customers directly, and from the regulatory viewpoint it is very important that the regulatory agency have jurisdiction over the entity that is providing the service. And for those two primary reasons, the city policy is not to permit resale of electric utility services in the city.
> Q. What's so bad about resale, Mr. Tyson?
> A. Several — several things are bad about it. One, the city would have no control over the party that is doing the reselling, of his rates, of the service he provides. And when people have a complaint about the service, they normally call the utility or the city. When you have a situation where you do have someone reselling service, you have a problem of determining who is at fault, and if there is a problem you have difficulty in obtaining the solution to the problem. I'm talking about rates and service now.
> And the city has had some experiences over the years, not so much from resale but from other instances where there was another party involved between the utility that was

Another reason, offered by Dr. Paul Garfield, a public utility economist, states that insulation of different market prices to different classes of customers is necessary to maintain the entire public utility rate structure and to spread costs of service equitably to each class of customers.[7] Restrictions on resale, therefore, provide stability in the operation and upkeep of utility service.

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providing the service and the customer that was actually receiving the service.

(T. 1383-85).

[7] Dr. Garfield testified in the trial outside the presence of the jury because of the District Court judge's order *in limine* concerning evidence of impact on ratepayers. Dr. Garfield testified on direct examination:

> Q. Now, are provisions such as the one at stake in this case, where it says the rates are not available for resale, are these types of provisions in rates normally and customarily accepted by regulatory authorities?
>
> A. Yes. They were accepted a long time ago. Issues as to resale prohibitions just don't arise. I think this is the first one I have encountered, and I have been at work in this area for twenty-eight or twenty-nine years.
>
> Q. Could you explain to the Court what the purpose of these types of rate provisions is, that is, prohibition against resale?
>
> A. Yes, sir. First of all, the regulators want the utility companies to earn the revenues that they are supposed to earn from each market sector. That is, when regulatory decisions are made as to how much revenue is supposed to be produced from each market sector, or from each rate schedule, they expect that to take place. The resale ban amounts, in effect, to insulation as between the market sectors so that a customer can't buy from the light company and turn right around and sell to another customer of the light company.
>
> In other words, the resale prohibition is there to create orderliness in the regulatory process, so that when a regulatory decision is made which says the utility company will earn a certain portion of its revenues from a certain market sector, that expectation is supposed to be realized. And it can't be realized with any certainty if the customers can start doing business with one another.
>
> Which leads me to my second point, in answer to your question: Public policy is very clear in desiring what ultimate consumers of utility service be served by reg-

As a public utility, HL & P is required to serve all similar customers in a like manner. Certain groups of customers, however, have had the rate structure and the right to resell power applied differently in an historical context. Regarding this variation, HL & P admits that, for redistribution to individual tenants, office buildings are served by one meter. However, retail establishments in office buildings, with the exception of businesses located in older buildings in downtown Houston, are individually metered. With the establishment of resale restrictions aimed at individual businesses, old businesses were permitted to continue operating without suffering an expensive conversion to an individual meter.

Apartment complexes in Houston are also permitted to resell power to individual tenants. Under a city ordinance, landlords may opt to have a single meter for an entire

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ulated public utilities, by regulated public utilities who are responding to public officials with the power to tell those utilities what to do, if those in official positions don't like what the utilities are doing.

Q. At least insofar as the utility's ability to earn money, is it fair to say that the resale prohibition, such as that which is at stake in this case, is designed to insure that the utility will earn from each class of rate that money which that rate is designed to produce for the utility?

A. Yes, this was the first of the two points that I was explaining when I made reference to orderliness in the control of the utility's operations by the regulators. But that first point is integral with the second point I was developing, which was that public policy abhors utility service being rendered by an unregulated supplier. And the two are not separable. If the customers can turn around and resell, since they are not public utilities, a customer of a utility who resells to yet another customer is an unregulated seller, and this is against public policy.

Q. It is accurate to say, then, that provisions such as this one, that say the rate is not available for resale service, is it accurate that they are an integral part of the rate structure?

A. Absolutely. The resale provision is just as integral a part of the total offering to serve as are the pricing provisions. These are not severable or separable, they are integral.

apartment complex or may have each individual tenant have a single meter. HL & P has always permitted the customer to take the service providing the most favorable rate application.

All shopping centers in Houston have been served by individual meters for each retail store. This has been in keeping with HL & P's modern policy to meter every retail store separately and not to allow resale from a master meter to individual stores. All applications from shopping centers for resale service in the past have been uniformly declined by HL & P.

Alleged Violations

Planning and development began in 1967 and 1968 for Almeda Mall and Northwest Mall. During 1967, the Malls inquired of HL & P about the possibility of purchasing electricity through a limited number of meters so that they could redistribute and resell the electricity to the individual tenants of the Malls. Under this proposed plan the Malls would receive electricity at the cheaper LGS rate, since the kilovolt demand at each meter would far exceed the required 700 kva minimum. They would then resell to the tenants through individual meters at the higher MGS rate, thus realizing a profit. The Malls planned to include the cost of the electricity in the rent charged each tenant on a per square foot basis. HL & P informed the Malls that its policy did not permit the resale of electric power by retail purchasers.

In 1972, Almeda and Northwest Malls formally requested to convert the individually metered stores in their malls to a single meter system convenient for resale. This was refused by HL & P regarding resale to tenants. HL & P did indicate, however, that a single meter could be set up for consumption in office space, storage areas, and common areas within the Malls.

Planning and development for Westwood Mall began in 1973. Westwood requested a limited meter system to

enable it to resell electricity to its tenants. HL & P also denied this request.

The Litigation

Following these denials, Almeda and Northwest Malls and Westwood Mall brought separate suits against HL & P, alleging that HL & P's denial of resale violated federal antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, seeking damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, and injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. The separate actions were consolidated for trial, with jurisdiction based on Sections 4, 12, and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, 26.

The Malls contend that the utility has denied them the right to compete with it in the retail sale of electricity to their tenants. They also allege that this denial has injured competition between them and other regional shopping centers in the Houston area.

The prohibition against sale for resale, appellants argue, has a detrimental effect on competition in several respects. One argument is that the purchase of electricity by appellants at the LGS rate for resale to tenants would produce not only a profit for the Malls but also a savings to the individual consumers. By purchasing through one, two, or four meters, instead of numerous individual meters, the electrical expenses for an entire mall would be reduced by eliminating the higher charge for initial uses on each meter. A second savings would occur by purchasing power under the LGS rate as opposed to the MGS rate usually necessary for individual meters. While the Malls admit that the design and installation of their own distribution systems would create a substantial initial capital expense, they contend that in the long run they would still realize savings to the tenants and an additional profit for themselves.

The mall owners admit that they have intended to charge their tenants the same rate that would be charged by HL & P on the retail level. This is where they would make a profit.

However, the mall owners explain that the individual tenants would realize savings through the lower rate passed on to them as to mall common areas, parking lots, and heating, ventilating and air conditioning systems, expenses presently borne by the tenants through a common area charge made to them.

Another argument is that the mall owners' plan would afford a more reliable and efficient distribution system. This system, they say, would provide better circuitry, safety, and prevention of power failures. Additionally, peak load monitoring devices would be utilized which could reduce overall electrical charges for all occupants when demand became especially high.

A *second* area of competitive injury alleged by the appellant Malls relates to their ability to compete with other regional malls for tenants. Due to the refusal to allow resale, the Malls contend they were unable to sign up tenants as quickly as a more attractive shopping mall package of services might have brought. This was heightened when compared to the competitive market existing from well established shopping centers.

As a result of these strictures on their operations, the appellant Malls view HL & P's actions as inhibitions on their chance to provide the tenant consumers better service — in effect, competitive service. Their specific antitrust claims charge that HL & P's practice is a *per se* violation of Section 1 of the Sherman Act, which prohibits an unreasonable restraint of trade, and is a violation of Section 2 of the Sherman Act, which prohibits possession and maintenance of monopoly power. Appellants assert they have suffered damages to be measured by the amount of money they would have saved through resale, minus the

cost of investment made in their own distribution system.[8] They further seek injunctive relief that would allow resale practices to their shopping mall tenants in the future.

II.

Appellants' antitrust allegations of monopolization and restraint of trade are unique in nature.[9] As a general rule, competition is not regarded as feasible at the retail or distribution level in the electric power industry.[10] Nevertheless, federal antitrust laws are applicable to electrical utilities. *Cantor v. The Detroit Edison Co.*, 428 U.S. 579, 96

[8] Damages calculated by the appellants were computed by taking the gross dollars which each appellant mall would have received for resale of electricity and substracting from this gross figure the cost of electricity they would have paid under the LGS rate and the cost of investment in the distribution system designed by each mall. The yielded result would produce the net profit lost by each mall. Estimated computations showed that Almeda Mall lost between $764,680.02 and $789,907.65 in profits, depending on the approach taken in certain calculations. The damage figures for Northwest Mall ranged between $807,092.95 and $991,303.78 and the figures for Westwood Mall between $529,109.51 and $1,448,463.35.

[9] At the outset of this discussion of legal issues, we note that the appellee HL & P filed a cross-appeal on the issues of (1) immunity from application of the antitrust laws based upon "state action" and (2) "primary jurisdiction." The District Court found for the appellants on these issues and relied on *Cantor v. The Detroit Edison Co..*, 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed.2d 1141 (1976), and *Litton Systems, Inc. v. Southwestern Bell Tel. Co.*, 539 F.2d 418 (5th Cir. 1976). We agree with the reasoning of the District Court on these issues and find no reason to discuss them here since we hold for the appellee HL & P on the main issue presented concerning application of the antitrust laws.

[10] Commentators point out that retail competition is not usually applicable in antitrust law. *See* Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 Colum. L. Rev. 64, 94 (1972). The author notes that competitive distribution processes within the electric power industry usually lead to duplicate facilities that increase cost and waste. He concludes, "competition in the usual sense at the distribution level is generally out of the question." Shenefield, *Antitrust Policy Within the Electric Utility Industry*, 16 Antitrust Bull.

S. Ct. 3110, 49 L. Ed. 2d 1141 (1976); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973).

In order to establish a violation under Section 1 of the Sherman Act[11] the appellants must show that a conspiracy, contract or combination exists and that such conspiracy, contract or combination unreasonably restrains trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186 (5th Cir. 1978).

In applying Section 1 to antitrust violations, in some cases the courts have recognized a *per se* violation and in others have applied the "rule of reason" standard. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), the Supreme Court overruled the application of the *per se* rule as was done in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967) to vertical restrictions imposed in an economic market.

It was held that:

> particular applications of vertical restrictions might justify *per se* prohibition under *Northern Pac. R. Co.* But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than — as in *Schwinn* — upon formalistic line drawing.

681, 684 n. 8 (1971). The author comments on the resale of electric power at the *wholesale* level and notes:

> The Antitrust Division of the Department of Justice and the electric utility industry have traditionally viewed the subject of retail sales as being by and large withheld from the operation of the antitrust laws as they may affect intra-industry relationships.

[11] 15 U.S.C. § 1 states in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

> In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to *Schwinn*. When anticompetitive effects are shown to result from particular verticial restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act.

433 U.S. at 58-59, 97 S. Ct. at 2562.

In doing this, the Court reaffirmed that the appropriate standard for determining whether a *per se* violation of Section 1 existed was that standard set forth in *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958):

> [t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

356 U.S. at 5, 78 S. Ct. at 518.

What it comes down to is that all facets and circumstances of a case must be weighed in arriving at a decision whether a particular restrictive practice is prohibited as imposing an unreasonable restraint on competition. *Sylvania, supra* 433 U.S. at 49, 97 S. Ct. at 2557.[12]

[12] As *Sylvania* points out in a footnote, a frequently cited proper analysis of the "rule of reason" is that of Mr. Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918):

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history

To establish a monopoly violation under Section 2 of the Sherman Act[13] a complainant must prove two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident. *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); *Heatransfer Corp. v. Volkswagenwerk, A. G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978).

Monopoly power has been defined as "the power to control prices or exclude competition" and the existence of such power *ordinarily* may be inferred from a predominant share of the relevant market. *Grinnell, supra* 384 U.S. at 571, 86 S. Ct. at 1704.

In this Circuit to succeed with a private antitrust action alleging an unreasonable restraint of trade, one must show more than a violation of antitrust law and damage to himself. He must show that the alleged unreasonable restraint tends to, or is reasonably calculated to, prejudice the *public interest. Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 440 U.S. 909, 99 S. Ct. 1218, 59 L. Ed. 2d 457 (1979); *Rogers v. Douglas Tobacco Bd. of Trade, Inc.*, 266 F.2d 636 (5th Cir. 1959), *cert. denied*, 361 U.S. 833, 80 S. Ct. 85, 4 L. Ed. 2d 75 (1959).

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of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

[13] 15 U.S.C. § 2 states in part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ..

This rule may be avoided, however, if the private action alleges a *per se* violation or is based upon both restraint of trade *and* monopolization actions. In such instances, injury to the public interest and competition is inherent in the charges.

Regarding an unreasonable restraint of trade under Section 1, appellants contend that an absolute restriction on resale is the exact type of monopolistic manipulation sought to be prevented. They assert that this practice impedes intrabrand competition while not at the same time stimulating interbrand competition, which does not exist in the Houston area.[14] This practice is further exacerbated, it is argued, by the discriminatory practices prevalent in resales to landlords and office buildings. Regarding possession of monopoly power and the willful acquisition or maintenance of that power under Section 2, appellants point out that HL & P holds a solid monopoly position in the relevant market.[15] They add to this the fact

[14] Interbrand competition is the competition found among the manufacturers of the same generic product and is the primary concern of antitrust law. Intrabrand competition is the competition between distributors of the product of a manufacturer, whether it be at wholesale or retail level. Even though the two competitions may operate independent of each other, it is possible with a market involving vertical restrictions for a reduction in intrabrand competition to stimulate interbrand competition. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. at 51-52, 97 S. Ct. at 2558.

Since HL & P holds a natural monopoly in the Houston area as the only provider of electric power, interbrand competition does not exist. The appellants assert, therefore, that intrabrand competition in the form of retail resale of power has been hindered without any counterbalancing increase in interbrand competition which could justify HL & P's restriction against resale. This assertion assumes, naturally, that vertical restraints on competition are being exercised by HL & P and that resale is intrabrand competition.

[15] The appellants point out that the relevant market might be identified as one of three possible service areas: (1) the retail sale of electric power in the entire service area of HL & P, (2) the area covering merely the City of Houston, or (3) the competitive market area surrounding each of the appellant

that HL & P actively maintains its monopoly and exerts full control over prices and competition since it is the only source of power supply in the market. The policy against resale is equated with willful maintenance of the monopoly in excluding competitive sales and resulting profits for the appellants. To support their Section 2 contentions, appellants rely heavily on the analogy they draw between the present case and the Supreme Court decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973).

Otter Tail was a case in which the Otter Tail Power Company refused to sell at wholesale or to wheel[16] electric power to certain municipal power systems, the effect of which was to foreclose competition from prospective or existing municipal systems and to preserve the retail sale of power for Otter Tail. The Supreme Court held this to be a clear violation of the Sherman Act and an abuse of monopoly power. Actions taken by Otter Tail to preserve its economic position were not justifiable in light of the resultant anticompetitive impact.[17]

In *Otter Tail*, however, the municipal power systems were independent distribution systems capable of competing with the Otter Tail utility. Competition clearly existed

malls. They assert that, regardless of the area designated as the relevant market, HL & P actively maintains a monopoly over the sale of electric power in it.

[16] "Wheeling" electric power refers to transfer by direct transmission or displacement electric power from one utility to another over the facilities of an intermediate utility. The Otter Tail Power Company not only refused to sell power directly to municipal power systems at a wholesale price but also refused to let the municipalities receive electric power from other utilities via transfer over their facilities. *See Otter Tail Power Co. v. United States*, 410 U.S. at 368, 93 S. Ct. at 1025.

[17] *See* Watson and Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 563-65 (1977), criticizing *Otter Tail* for failing to examine precisely the application of conventional monopolization principles to regulated industries with natural monopoly characteristics.

for the total retail market of entire municipalities, which could opt for service from Otter Tail or from the municipal system. The refusal by Otter Tail to sell electric power at wholesale or to transfer power, therefore, removed the option of choosing the desired power system.

Such an option does not exist here, however, because HL & P is the only electric utility supplying power to the Houston area. Other utilities could enter and compete and be granted a franchise by the City of Houston. The fact is that none have chosen to do so.

Moreover, *Otter Tail* involved the *wholesale* sale of power (as opposed to retail sale) and also involved the transmission of power from other utilities. In the present case, HL & P is in a position similar to the municipal power utilities in *Otter Tail except that it generates it own electrical power.* It has not refused to sell power at wholesale to a competing distribution system and it has not refused to transfer and supply power in such a situation. A refusal to sell power at wholesale so as to prevent another system from selling at a different, competitive retail rate is one thing; selling power at retail rate and refusing to allow the purchaser to resell at the same retail price is a different matter. *In the latter situation there is no competition.*

In the present case, the Malls generate no electricity. They transmit none. They do not desire to distribute electricity except on their own property and then only at a price no different to that charged by the utility, regulated by the City. What the Malls wish to do is to pre-empt the utility's business for their own profit, not as true competitors for the same market.

We hold that appellants have proven no antitrust violation and no antitrust injury.

The trial court noted, and we agree, that the activity sought by the appellants is more akin to mere "substitution" than to competition. By achieving the goal to resell

electricity on the retail level, appellants will be merely plugging themselves into the flow of electricity and reaping profits as a non-competitive middleman.

Appellants argue that from a common meter they will pass along some forms of public benefit such as lower costs for maintaining mall common areas, but the utility has offered to do this. The claim that the Malls would maintain more efficient and reliable distribution systems hardly rises above the speculative. The expert testifying for appellants presented a distribution system not specifically recommended for nor approved by the appellants. The benefit to be derived from such system was weakly based.[18]

The record is clear that HL & P is the sole supplier of electric power in the Houston area. Historically there has been no real competition at any level of service — wholesale, retail, or otherwise. The electricity that the various tenants receive, therefore, will come from HL & P, whether directly from individual meters or indirectly from resale provided by the appellants. The price would be the same. It is hard to see how the consumer tenant would have realized any material advantage. Furthermore, while the appellants argue that resale would give the tenants an option for service, we note that they intended to resell to all tenants under a lease agreement that included in it the cost of electric power. No voluntary choice of electric service was planned by the appellants. The mall tenants would have to buy their power at retail from the appellants.

[18] The appellants had Mr. Irving Schwartz, a consulting electrical engineer, testify concerning the economic advantages of a single meter system. His main testimony related to recoverable monetary damages based on savings in using a single meter system under the cheaper LGS rate. His evidence did touch on the design of his system but this was not specifically compared with the system used by HL & P regarding efficiency and reliability. The plan proposed by Mr. Schwartz was designed a month prior to trial for comparison purposes.

As to competition with other malls, that is where the competition is, not with the public utility which is being sued in this case.

The appellants additionally have failed to prove any type of "antitrust injury" which could justify an award of damages under Section 4 of the Clayton Act. In order to recover damages under Section 4, appellants must prove in addition to a traditional antitrust violation

> *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." (Citation omitted.)
>
> Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977).

Here the appellants fail to meet this standard. A showing of lost profits to the appellants is insufficient by itself to establish a compensable injury under the antitrust laws since there is no parallel injury to competition. The antitrust laws were not intended to prevent the type of activity undertaken by HL & P in the present case concerning resale of electric power. The antitrust laws were designed to protect *competition* and not necessarily *competitors*. *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962). The rationale outlined in *Brunswick* is fully applicable to the present case and necessitates a finding that antitrust damages are not recoverable by the appellants.[19]

We add that, based upon the present facts, there would be great difficulty in proving violations of Sections 1 and 2

[19] *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1134 (1976): ("Thus, as long as there is no anticompetitive activity, the fact of injury to a competitor is *not* a concern of the antitrust laws.).

in the event some form of competition did exist between the Malls and HL & P. The restrictive activity regarding resale by HL & P does not project the "pernicious effect on competition and lack of any redeeming virtue" standard necessary to establish a *per se* violation of Section 1. It is also questionable that HL & P's activities could be categorized as unreasonable under a "rule of reason" analysis.

Furthermore, application of the "rule of reason" or of a Section 2 monopolization charge would be conceptually difficult to apply in this case due to the unique status of a regulated electric utility. As a natural monopoly with regulated rates and services, HL & P does not fit the mold of the traditional monopolist sought to be restricted by Section 2. It does not have the direct power to control prices or exclude competition. Monopolization cases involving such regulated industries are special in nature and require close scrutiny. The reason for this is that regulation is considered an adequate replacement for the lack of competition that exists with a natural monopoly. In such a case, controlling a predominant share of the relevant market cannot infer the traditional monopoly power associated with an entity outside the regulated field.[20]

[20] *See* Watson and Brunner, *supra* note 17, at 566-69. The authors discuss the peculiarities involved in applying antitrust law to regulated monopolies. With regard to market share data they comment:

> These industries are regulated precisely because it has been determined that competition either cannot or should not prevail there. Thus, the regulatory scheme not only seeks to act as a surrogate for competition, but may, for public interest reasons, affirmatively seek to exclude competition from the marketplace.
>
> * * * * * *
>
> In particular, where economic and legal forces cause a single firm to obtain a dominant market share, lower courts have recognized that this situation cannot support an inference of monopoly power. [Footnote omitted.] For example, in *United States v. United Shoe Machinery Corp.* [110 F. Supp. 295 (D.C.)] Judge Wyzanski held that there is no monopolization if the existence of a monopoly market

Regulation of the monopoly also tends to diminish and make unlikely the willfulness or intent to maintain such monopoly power in violation of antitrust laws.[21] While such an abuse can and does occur, as exemplified in *Otter Tail, supra*, that happens when true competition is operative and anticompetitive activity surfaces.

The appellant Malls were correctly denied injunctive relief and damages for failure to prove violation and injury under the antitrust laws.

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share is due "solely to . . . licenses conferred by, and used within, the limits of the law, (including . . . *franchises granted directly to the enterprise by a public authority*)." (Emphasis supplied).

Concerning the power to control prices, they add:

> Where prices of a regulated firm are subject to meaningful and timely review by the agency, the firm would appear to lack one of the two indicia of monopoly power.
>
> * * * * * *
>
> Thus, where the regulatory scheme is effective, regulated firms are not permitted to engage in monopoly pricing and are encouraged to operate their business efficiently — roughly the same ends as are sought through the promotion of competition. Consequently, in these circumstances, the absence of competition in a regulated marketplace need not mean that the statistically-dominant firm in that market possesses monopoly power over prices or that the prevailing structure necessarily frustrates anti-trust policy.

[21] *See* Watson and Brunner, *supra* 17, at 575-79. The authors suggest that "willfulness" by a regulated natural monopoly may be shown only by evidence of predatory conduct or other exclusionary acts contrary to public policy. Contending that no court has yet considered the question in a regulated industry context, they offer three guidelines for consideration: (1) conduct enforcing a clearly articulated public policy against competition in a particular industry should not be considered exclusionary conduct demonstrating willful monopolization,(2) actions, or refusals to act, required because of one's status as a public utility or common carrier should not be considered predatory conduct, and (3) reasonable actions legitimately taken by a regulated monopoly to protect its ability to provide reliable, economic service to customers should not be considered a form of improper "willfulness", particularly where the monopoly's cus-

III.

A last point raised by appellants concerns the ability of this Court to exercise jurisdiction over their state statutory claims relating to discrimination in prices and services by HL & P. These claims, brought pursuant to Tex. Rev. Civ. Stat. Ann. art. 1438,[22] specifically refer to the different practices exercised by HL & P with regard to office buildings, apartment houses, and shopping centers.

The trial court relied primarily on the recent Texas decision in *Southwestern Bell Tel. Co. v. City of Kountze*, 543 S.W.2d 871 (Tex. Civ. App. 1976), which held that exclusive jurisdiction rested with the state regulatory authority, the Public Utility Commission set up with the passage of PURA. It granted HL & P a directed verdict on this issue for lack of jurisdiction. We agree.

Appellants argue that they may maintain their state claims under Article 1438 based on Texas common law and independently of the jurisdictional grant outlined in PURA. Prior to the passage of PURA this may have been so. Since the passage of PURA, however, exclusive original jurisdiction concerning all electric rates, operations, and service rests with the governing body of each municipality with an appeal available to the Public Utility Commission.[23] Article 1438, by contrast, does not speak to jurisdic-

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tomers do not have alternative sources of obtaining the service the monopoly provides.

We are also aware that an action brought under Sections 1 or 2 of the Sherman Act requires a showing of restraint of trade or monopolization affecting interstate commerce. Because of our views already expressed denying relief to appellants for failure to show anti-competitive activity, a discussion of the interstate commerce issue is not necessary.

[22] Tex. Rev. Civ. Stat. Ann. art. 1438 provides:

> It shall be unlawful for any such corporation to discriminate against any person, corporation, firm, association or place, in the charge for such gas, electric current or power, or in the service rendered under similar and like circumstances.

[23] Tex. Rev. Civ. Stat. Ann. art. 1446c, §§ 17(a), (d).

tion but merely establishes a cause of action for the discriminatory acts.

The *Kountze* case supports the current Texas law that jurisdiction lies with the Commission, and in the case of electrical utility rates and services, originally with the City of Houston. This is reaffirmed by the more recent case *General Tel. Co. of the Southwest v. City of Point Comfort*, 553 S.W.2d 808 (Tex. Civ. App. 1977). We also note that an earlier decision, *Lea County Electric Cooperative, Inc. v. City of Plains*, 373 S.W.2d 90 (Tex. Civ. App. 1963), held prior to the passage of PURA that an action based in part upon Article 1438 and competing rate structures between a city and an electric cooperative was properly dismissed by a trial court because proper jurisdiction for rate regulation and unjust charges rested initially with the city and not the courts. No cases since the enactment of PURA have been found which would indicate anything to the contrary.

We therefore affirm that part of the District Court decision along with the finding of no antitrust violation and injury.

AFFIRMED.

In The United States District Court For The Southern District Of Texas, Houston Division

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February 16, 1978

Civil Action

No. 73-H-1576

Almeda Mall, Inc., and Northwest Mall, Inc.,

Plaintiffs,

v.

Houston Lighting & Power Co.,

Defendant.

Consolidated With

Civil Action

No. 73-H-1746

Westwood Mall, Inc., a Maryland Corporation,

Plaintiff,

v.

Houston Lighting & Power Co.,

Defendant.

BENCH RULING

The Court has considered the cross-motions for directed verdict and the supporting legal memoranda which, when combined, ask the Court to engage in a Rule 50 review of the evidence as to every material legal issue in this novel and complex antitrust action. It is apparent that the parties generally stipulate to the essential facts of the dispute, particularly those facts which this Court views as determinative. Because Rule 50 is designed to allow the Court to "take away from the consideration of the jury cases in which the facts are sufficiently clear that the law requires a particular result," 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521, at 537 (1971), and because the difficult issues posed by the evidence are issues of law as opposed to fact, the Court concludes that the case is one which is properly resolved in full by the Court at this stage of the trial. As hereafter set forth, the Court rules in favor of defendant as to both the federal antitrust and state discriminatory claims of plaintiffs. For the sake of brevity, only those legal issues considered by this Court to be dispositive of this controversy are resolved.

I. Federal Antitrust Claims

This Court previously has held that defendant is not automatically immune from the antitrust laws, a question legally distinct from the narrower question of whether defendant's prohibition against resale, as applied to these plaintiffs, is a violation of the antitrust laws. Plaintiffs' antitrust allegations of monopolization and restraint of trade apparently are unique as applied to an electric utility at the retail level of electric power distribution. Indeed, one commentator discussing the electric power industry has noted that in such a retail market, "competition in the usual sense at the distribution level is generally out of the question". Meeks, *Concentration in the Electric Power Industry: The Impact of Antitrust Policy*, 72 COLUM. L. REV. 64, 94 (1972). *See also* Watson & Brenner, *Monopolization by Regulated "Monopolies": The*

Search for Substantive Standards, 22 ANTITRUST BULL. 559 (1977); Shenefield, *Antitrust Policy Within the Electric Utility Industry*, 16 ANTITRUST BULL. 681 (1971).

Because of the defendant's status as a natural monopoly and the uniqueness of plaintiffs' contentions, the *per se* approach to liability urged by plaintiffs under both Sections 1 and 2 of the Sherman Act "without elaborate inquiry into the precise harm . . . [the practices] cause or the business excuse for their use," *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 696 (5th Cir. 1975), would be ill-founded and contrary to existing precedent. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, ___ U.S. ___ [53 L. Ed. 2d 568] (June 23, 1977); *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972). Additionally, analysis under a "rule of reason" test is conceptually difficult both legally and factually in view of the numerous economic, historical and other facts which must be considered in drawing the appropriate contours of antitrust responsibility on the part of utilities such as the defendant. Because an element essential to recovery under both Sections 1 and 2 is missing from plaintiffs' proof, that is, proof of antitrust injury, the Court does not address the issues of "unreasonable restraint of trade" under Section 1 or "monopolization" under Section 2, including the common issue of interstate commerce.

It is the rationale of the recent Supreme Court decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), upon which this Court rests its decision against plaintiffs on their antitrust claims. *See Kaplan v. Burroughs Corp.*, 426 F. Supp. 1328, 1334 (N.D. Calif. 1977) (applying *Brunswick* to Sherman Act claims under Section 1). In *Brunswick*, a Clayton Act case tried to a jury, the Supreme Court stressed that antitrust plaintiffs, in addition to the traditional elements for an antitrust recovery, must prove for purposes of a damage recovery under Section 4 of the Clayton Act

> "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that

> flows from that which makes defendants' acts unlawful."

Id. at ____ [50 L. Ed. 2d at 712]. This is consistent with the maxim expressed in *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), that the antitrust laws were enacted for "the protection of *competition*, not *competitors*," whether they be actual, potential or imaginary competitors.

The Court concludes that construing the evidence in a light most favorable to plaintiffs, they have failed to introduce sufficient evidence upon which the jury could find the presence of antitrust injury. Because the antitrust laws are designed to protect competition as opposed to competitors, a mere showing of lost profits to plaintiffs as a result of defendant's practice, even if assumed to be technically illegal, is insufficient to establish an injury compensable under the antitrust laws. *Brunswick, supra.* Rather, plaintiffs must prove an anticompetitive injury as a result of defendants' refusal to provide electricity for resale or, phrased on a more theoretical level, that a holding for plaintiffs would advance the competitive aims of the antitrust laws. *See* Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976). This they have failed to do.

Plaintiffs argue that they desire to "compete" with the defendant in the retailing of electric power and have been denied the ability to do so by defendant's enforcement of the prohibition against resale. The proof establishes that the defendant owns a non-exclusive franchise from the City of Houston for the generation, transmission distribution and furnishing of electric power. As a result thereof, there historically has been no real competition at any level of service, including the retailing of electricity.

Plaintiffs' use of "competition" terminology to describe their proposal is difficult for the Court to understand and grasp in light of the evidence, but it is a prerequisite to any showing of anticompetitive injury. Indeed, the central

question is whether the instant case involves a request and denial for "competition" or mere "substitution". *Cf. Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1247 (5th Cir. 1975). In other words, is there sufficient evidence of competition inherent in plaintiffs' proposal to warrant a finding of anticompetitive injury as a result of defendant's refusal to deal?

If plaintiffs' request was honored by defendant or mandated by this Court, there is no indication from the evidence that attributes associated with the competitive model would surface. Evidence in the record does not suggest any increased efficiency in the distribution or furnishing of electric power. The defendant would continue to generate, transmit, distribute and furnish electricity to the individual mall tenants. The evidence also makes clear that there would be no tangible difference in the price of the service as offered either by plaintiffs or defendant. Therefore, given that the economic choice to the consumer tenant would not vary, the evidence measured under a most liberal view does not support plaintiffs' characterization.

Rather, the evidence demonstrates that plaintiffs, by replacing individual meters for each tenant with a single meter for the entire mall, would merely be plugging themselves into the flow of electricity and, more importantly to plaintiffs, the flow of profits as non-contributing middlemen. Plaintiffs would profit, not because they had economically contributed in delivering the product to the consumer in a competitive system, but because of a rate structure and differential premised on level of usage and costs of service. To define the utilization of this "profit-substitution" loophole as "competition" restricted by the defendant under any definition of the word would be to exalt form over substance and to engage, for purposes of the competitive policies underlying the Sherman Act, in a legal and factual fiction.

Because of the reasons stated above, this case is factually distinct from the seemingly controlling case of

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973), *aff'g*, 331 F. Supp. 54 (D. Minn. 1971), where antitrust injury was apparent as a result of the utility's refusal to wholesale electricity to proposed municipal systems for their distribution at the retail level. The municipalities in *Otter Tail* sought to establish local and independent distribution systems capable of competing with the utility in distributing electrical power, which is not the case here. Thus, unlike the instant case, the facts in *Otter Tail* would support a finding that defendant's refusal to sell or wheel power was anticompetitive, thereby supporting a finding of antitrust injury to the *Otter Tail* plaintiffs consistent with *Brunswick* and the antitrust laws.

Although it is not entirely clear from the oral argument whether plaintiffs additionally assert anticompetitive injury to their competition with other shopping malls, the Court would note that there is no evidence or inference that plaintiffs have been or will be placed at a competitive disadvantage to other shopping malls as a result of defendant's prohibition against resale. Defendant by statute is required to charge all entities similarly situated at the same rate and in the same manner. The evidence establishes that the practice of the defendant to date, from a service standpoint, has been to treat all shopping malls as similarly situated, a practice no doubt consistent with state law. *See* Tex. Rev. Civ. Stat. Ann., art. 1438. If defendant had honored plaintiffs' request or if the Court were to order such, it is clear that the defendant would be required to charge all shopping malls in the same manner as plaintiffs. Therefore, any assertion by plaintiffs that they have been or will be competitively injured by defendant's practice in their competition with other shopping malls is speculative and not supported by the evidence.

Thus, having heard the evidence, and viewing it in a light most favorable to plaintiffs, it is clear that this case does not involve competition. Therefore, whatever claim, if any, plaintiffs have against the defendant, it is not in substance an antitrust claim characterized by anticompeti-

tive injury. If at all, it is a rate claim under the applicable state statutes. Accordingly, the Court finds the evidence insufficient to go to the jury on the question of anticompetitive injury and therefore grants defendant's motion for directed verdict as to the federal antitrust claims.

II. State Statutory Claims

This Court, in its ruling on cross-motions for partial summary judgment, determined on the basis of the facts as established at that time, that it would be inappropriate under the federal judicial doctrine of primary jurisdiction to order that plaintiffs present their claims to the appropriate regulatory authority. However, the question of this Court's jurisdiction over plaintiffs' state statutory claims, an analytically distinct question from the issue of primary jurisdiction, was not specifically addressed by the Court. On the basis of the recent decision of *Southwestern Bell Tel. Co. v. City of Kountze,* 543 S.W.2d 871 (Tex. Civ. App. — Beaumont 1976, no writ history), and having heard in detail the nature of plaintiffs' claims, particularly the claim of undue discrimination, the Court is of the opinion that the state regulatory authority appropriately has exclusive jurisdiction over plaintiffs' state statutory causes of action. Therefore, defendant is granted a directed verdict on such claims for want of jurisdiction.

III. Conclusion

In view of the rulings announced herein, plaintiffs' motions for directed verdict and to determine the jurisdiction of the Court as a matter of law are denied as moot.

DONE at Houston, Texas, this 16th day of February, 1978.

Carl O. Bue, Jr.,
United States District Judge.

Supreme Court, U. S.
FILED
JUL 24 1980
MICHAEL RODAK, JR., CLERK

No. 80-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALMEDA MALL, INC, NORTHWEST MALL, INC. AND WESTWOOD MALL, INC.,

Petitioners,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

v.

HOUSTON LIGHTING & POWER COMPANY,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS RESTATED

1. Whether the petition should be granted to review the court of appeals' holding that private antitrust plaintiffs must prove antitrust injury to recover treble damages under Section 4 of the Clayton Act.

2. Whether the petition should be granted to review the claim of conflict with this Court's opinion in *Otter Tail Power Co.* v. *United States,* when the courts below concluded that Petitioners failed to prove actual or potential competitive impact.

3. Whether the petition should be granted to review the claim that the court of appeals' holding that Petitioners failed to prove antitrust injury conflicts with this Court's opinion in *United States* v. *Grinnell Corp.*

STATEMENT OF THE CASE

The opinions of the courts below contain accurate statements of the facts and the evidence (or lack of evidence) in this case. A comparison between the opinions below and the petition will reveal serious inaccuracies in the petition. Therefore, Respondent relies upon the opinions below for its statement of the case.

SUMMARY OF REASONS FOR DENYING THE PETITION

The opinion and judgment of the court of appeals in this cause are correct and do not conflict with the decisions of any other court of appeals or with any applicable decisions of this Court. Accordingly, the petition should be denied.

ARGUMENT

A. The Decision of the Court of Appeals Is in Full Accord With *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*

The basis for decision in the district court and an alternative independent basis for decision in the court of appeals was that petitioners failed to prove antitrust injury, as required by Section 4 of the Clayton Act, 15 U.S.C. §15. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.* 429 U.S. 477 (1977). Since this independent ground for decision is based upon the remedial provisions of Section 4 of the Clayton Act, and not upon the substantive requirements of the Sherman Act, there is no conflict with this Court's opinions in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973),

or *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1961), or any other applicable decision of this Court, and the petition should be denied.

B. The Decision of the Court of Appeals Does Not Conflict With *Otter Tail Power Co.* v. *United States.*

Otter Tail Power Co. v. *United States* was a government case and did not involve the requirement imposed upon private plaintiffs to prove antitrust injury under Section 4 of the Clayton Act. Therefore, the decisions below that Petitioners failed to meet their burden of proof under Section 4 of the Clayton Act do not conflict with *Otter Tail.*

The factual distinctions between this case and *Otter Tail* drawn by the court of appeals are fully substantiated by the quotations from *Otter Tail* appearing in the petition at pages 11-13. As the opinions below demonstrate, in contrast to the situation of Otter Tail Power Company, Respondent is the franchised retail distribution company in the City of Houston. Respondent is a fully integrated utility and generates its own electricity, but unlike Otter Tail, which was seeking to prevent the establishment of competing retail distribution companies in several municipalities within its service area in which it had lost its franchise, Respondent has not refused to sell or transfer power to other retail utilities within its service area. The courts below concluded that Petitioners' attempt to compare their private property to municipal retail electric distribution systems was unsupported by the evidence. The court of appeals has not misread *Otter Tail,* and its holding does not conflict with the legal principles underlying this Court's decision in that case.

Equally significant, the court of appeals and the district court both correctly concluded that Petitioners produced no evidence of real competition for retail customers, no evidence of the so-called "efficiencies and innovations" referred

to repeatedly in the petition, and no evidence of material competition between Petitioners and any other regional malls. For all of these reasons, the decision of the court of appeals does not conflict with *Otter Tail,* or any other applicable decision of this Court.

C. The Decision of the Court of Appeals Does Not Conflict with *United States* v. *Grinnell Corp.*

The holding of the court of appeals that Petitioners failed to prove antitrust injury does not graft a third element onto the well-recognized elements of proof of the offense of monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2. The court of appeals, citing *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1961), sets out the accepted elements of proof of monopolization under Section 2 and relies upon them in its analysis. Petition at 14a. Whether or not Petitioners could prove a violation of Section 2, as private plaintiffs they must also prove antitrust injury, as required by *Brunswick.* This requirement in no way conflicts with *Grinnell. Brunswick,* which construes Section 4 of the Clayton Act, does not involve the substantive standards of Section 2 of the Sherman Act, and neither of the decisions below cites *Brunswick* for the proposition that antitrust injury is an element of monopolization. Accordingly, the petition should be denied.

CONCLUSION

This case was correctly decided by both the district court and the court of appeals. The questions presented by the petition, taken individually or as a whole, provide no reason for this Court to exercise its powers of review, and the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify the service of the foregoing was made on July 21, 1980, by depositing three copies of same in the United States mails, First Class Postage Prepaid, addressed to: Lewis A. Noonberg, Piper & Marbury, 1100 Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201.

.....

William R. Brown